

<sup>1</sup> P.H. Trans., Cl. Ex. 5 at 3 (Dr. Murati's May 26, 2010 report).

Respondent argues the ALJ should be affirmed in every respect.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

In July of 2009, claimant was hired as a laborer and a brick tender and assigned to work at a construction site in Hutchinson, Kansas. This job required claimant to lift bricks and move materials as needed. According to claimant, he began to develop a sore right shoulder in February 2010. Claimant did not report this problem to his employer although he admittedly attributed his complaints to his work activities.

Claimant continued his regular work duties until April 7, 2010. On that date, his shoulder became more painful although he continued working his entire shift. On April 8, 2010, claimant testified that he called in sick. He provided respondent with no further explanation for his absence. He says he did the same for April 9. Claimant indicated that he did not notify respondent about his shoulder complaints as he did not want to cause problems.<sup>2</sup>

On Saturday, April 10 and Sunday, April 11, 2010, claimant noticed his shoulder was swollen and painful. Claimant testified that he did nothing over the weekend or in the months earlier that would have caused these symptoms other than his regular work duties.

On Monday, April 12, 2010, claimant called in sick to work. He provided no other explanation. He then went to the local emergency room complaining of aching pain, but denied any numbness or tingling. These records reflect an onset of 6 to 7 months earlier, while shoveling mud and moving blocks.<sup>3</sup> In another part of the record claimant reports that his shoulder began hurting "several days ago" and that his symptoms were "mild".<sup>4</sup> Claimant was discharged with a strain to his right shoulder and told to follow up with his personal physician.

Claimant went to see his employer on April 13, 2010 and advised that he had a work-related injury. He testified that his supervisor, Randy Joy, became angry and would not let him explain the circumstances surrounding his injury. Mr. Joy denies getting angry, but he agrees claimant did call in on April 9 and 10 (not on the 8<sup>th</sup>) but at no time did claimant explain he had sustained any sort of an injury on April 7, or at any other time before that.

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<sup>2</sup> *Id.* at 35.

<sup>3</sup> *Id.*, Cl. Ex. 4 at 13 (Apr. 12, 2010 ER record).

<sup>4</sup> *Id.*

Claimant returned to the emergency room on April 16, 2010 this time complaining of right shoulder pain which he said was “due to old work comp injury from mos ago”.<sup>5</sup> This same record refers to an onset “6 months prior to arrival” with mild symptoms that are intermittent.<sup>6</sup> The examination revealed no deformity, no ecchymosis, no swelling, no warmth, his distal motor was intact but there was tenderness to palpation and pain while demonstrating an active range of motion.<sup>7</sup> Again, he denied numbness and tingling and described vague complaints of pain.<sup>8</sup> Claimant was ultimately discharged with a recommendation to follow up with his primary care physician.

Claimant then sought treatment at a local clinic on May 25, 2010. These records indicate that claimant was injured on April 7, 2010 while working. They go on to indicate that claimant is “essentially asymptomatic and ready to go back to work and needs to have a 50 pound weight limitation.”<sup>9</sup> Further, “other than that he has full range of motion in his shoulder and does not appear to have any significant discomfort.”<sup>10</sup>

The next day, on May 26, 2010, claimant was seen by Dr. Pedro Murati, at his lawyer’s request. Dr. Murati’s report reflects a date of accident of April 7, 2010 and describes a negative impingement examination as well as a negative Hawkins examination. Claimant had some atrophy of the right parascapular musculature and a slight decrease in muscle strength on the right shoulder. Dr. Murati diagnosed a right rotator cuff sprain or tear and recommended injections or possibly an MRI if claimant does not improve. He advised that claimant should “work as tolerated and to use common sense.”

Claimant has not returned to work for respondent as he testified he was fired after receiving his last paycheck on April 13, 2010.

After reviewing all the testimony in this matter,<sup>11</sup> the ALJ concluded that claimant had failed to meet his burden of establishing a compensable injury. Specifically, that

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<sup>5</sup> *Id.*, Cl. Ex. at 4 at 1 (Apr.12, 2010 ER record).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*, Cl. Ex. 4 at 2 (Apr. 16, 2010 ER record).

<sup>8</sup> On both trips to the emergency room, a blood alcohol test was administered because claimant smelled of alcohol. This is relevant only in that respondent was under the impression that claimant had left work on April 7, 2010, gone drinking and may have hurt his shoulder.

<sup>9</sup> P.H. Trans., Resp. Ex. A at 1 (May 25, 2010 office note of Dr. Jerome Spitzer).

<sup>10</sup> *Id.*

<sup>11</sup> Not only did claimant testify, Randall Joy, Tina Marie Ferland, John Goodwin, Dan Wade, and Shawn Gordinier all testified via deposition.

claimant had failed to establish that he sustained an accidental injury arising out of and in the course of his employment with respondent on April 7, 2010. He also held that claimant failed to establish that he was temporarily and totally disabled, or that he was in need of treatment.

The latter decision, relating to temporary disability benefits and the need for treatment are decisions that the Board, at this juncture of the claim, does not have jurisdiction to consider.<sup>12</sup> However, the Board does have jurisdiction over the former issue, whether claimant has established it is more probably true than not that he sustained accidental injury arising out of and in the course of his employment.

K.S.A. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends." K.S.A. 44-508(g) finds burden of proof as follows: "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.<sup>13</sup>

Here the ALJ was troubled by the numerous inconsistencies he found within the record. He believed claimant's testimony at the preliminary hearing to be inconsistent with the medical records. For example, one record indicates claimant's symptoms began in late 2009 while another indicates an acute onset on April 7, 2010. Claimant told Dr. Murati as well as another physician at a local clinic that the accident occurred on April 7. He also noted that while claimant apparently told one physician that he was essentially asymptomatic, the very next day he saw Dr. Murati who noted claimant's specific claims of sharp pain, inability to lift, sleep and tingling and numbness, all findings that were absent up to that point. The ALJ finally commented that "I don't know when your shoulder started to hurt, if it ever started to hurt, because you've never had an objective finding as to your shoulder, no matter who's examined you. The only findings have been subjective descriptions of pain. . . So all I have is subjective reports of pain, and I have a wide variety of dates of onset of that pain, and then I have you telling a doctor at Prairie Star that you don't hurt anymore and you're ready to go back to work, when you're here today asking for

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<sup>12</sup> *Carson v. Sprint Nextel Corporation*, No. 1,037,556, 2008 WL 4149970 (Kan. WCAB Aug. 27, 2008); *Gregory J. Grohusky v. United Parcel Service, Inc.*, Nos. 1,027,783, 1,032,468, 2007 WL 2043604 (Kan. WCAB May 11, 2007).

<sup>13</sup> *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

treatment and temporary total disability benefits. It just doesn't add up. It just doesn't add up at all."<sup>14</sup>

Accordingly, the ALJ denied claimant's request for benefits as he concluded claimant had failed to establish an accidental injury that arose out of and in the course of his employment on April 7, 2010 or any other day.

This Board Member concurs with the ALJ's analysis of the facts and finds that like the ALJ, she is not persuaded by the claimant's contention that he was injured while in respondent's employ. The contemporaneous medical records are indicative of subjective shoulder complaints, but the onset of those complaints is unestablished in this record. Dr. Murati's conclusions are not persuasive when compared to the facts and circumstances outlined in the remaining medical records contained in this record. And as it is claimant's burden to establish that fact, the ALJ's Order should be and is hereby affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>15</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bruce E. Moore dated August 12, 2010, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October 2010.

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JULIE A.N. SAMPLE  
BOARD MEMBER

c: Andrew L. Oswald, Attorney for Claimant  
Jeffrey E. King, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge

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<sup>14</sup> P.H. Trans. at 87-88.

<sup>15</sup> K.S.A. 44-534a.